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THE DEMOCRATIC LEGITIMACY OF CONSTITUENT REFERENDUM(S) IN CONSTITUTION-MAKING PROCESS WITHIN THE SCOPE OF TURKISH CONSTITUENT REFERENDUM EXPERIENCES

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ABSTRACT

The referendum experiences of each state vary according to their democratic background, development, and welfare level. Accordingly, it becomes hard to adopt a uniformed approach towards the issue and necessitates questioning the democratic value of each practice within itself. Although a referendum is a tool for reflecting the people's will, it may not necessarily take place in every case. Constituent referendums differ from other types of referendums in that the constituent power is not bound by any rule of law. In view of this, the democratic value of the constituent referendum has been chosen to be examined in this article, rather than the democratic value of referendums in general.

This article focuses on the relationship between the constituent referendum and democracy as a basis and questions whether constituent referendums are indeed a genuine tool of democratic constitution-making and whether they are sufficient to secure democratic legitimacy for the constitutions. Despite the fact that at first glance, constituent referendums tend to have their sights on a democratic goal, the practices reveal that the outcome is not necessarily in accordance with the intended goal. Particularly, the adoption of the 1961 and 1982 Turkish Constitutions has shown that this method is not sufficient in terms of ensuring democratic legitimacy. Therefore, the issue has been evaluated specifically in relation to the constituent referendums that ensured the adoption of the 1961 and 1982 Turkish Constitutions.

In this study, the relationship between the constituent referendum and the constitution-making process is discussed in a theory-oriented manner in the first three sections, and two important case analyses selected from Turkish constitutional law are included in the following sections. As a consequence, it has been concluded that constituent referendums, when held in antidemocratic settings, are incapable of ensuring democratic legitimacy for constitutions and thus are not necessarily a genuine instrument of democratic constitution-making.

KEYWORDS

Constitution-making, referendum, constituent power, constituent referendum, plebiscite, democratic legitimacy

INTRODUCTION

A referendum, which in essence aims to manipulate policies via political engagement, stands as a tool to cope with administrative policies that can block the system and is also quite effective in offering a wide support group to the ruling class. In addition, the general public, as the sole owner of sovereignty, can therefore act as a judge due to the common mistrust towards state policies or in the face of a long-disputed public problem. The phenomenon of the public as the arbiter is a factor boosting legitimacy in solving controversial matters, thus securing equilibrium. Hence, a referendum stands as a preferred method for administrators when it is aimed at finding a functional and effective solution to a specific constitutional problem or to secure legitimacy in the case of a regime takeover. In that sense, it is considered one of the most unique tools paving the way for the negotiation process, helping citizens to have a voice in public administration, and lifting up society to become democratic. Referendums are generally considered democratic instruments of political participation in compliance with these aspects, and it is predicted that they will lead to democratic results as they carry popular sovereignty into effect and create immediateness in political participation[1].

Nevertheless, under certain circumstances, a referendum could turn out to be an oppressive tool, solidifying the sovereignty of political authority over the general public. This method, which thus rubs away the sovereignty power of people, evolves into a malpractice harnessed by administrators in situations when they expect to serve their self-interests and to empower state bodies. Even when initiated by democratic administrations, referendums run the risk of turning a vast majority of society into a large minority in the eyes of others once they are carried out in pursuit of a political agenda. Besides, in referendum practices, the selection between the status quo and the promised regulation is defined as misleading, and when false promises are given, it may cause a handicap in achieving the expected goal from a referendum. In that case, society may become vulnerable to making decisions based on false data or irrational beliefs about the alternatives. Therefore, it may be misleading to assume that a referendum will always produce democratic results. When politicians initiate a vote to protect their own interests, a referendum has the potential to be abused[2]. Since this situation is especially important in terms of

[1] Shauna Reilly, *Direct Democracy: A Double-Edged Sword* (Lynne Rienner Publishers, 2018), 11–15; Hamide Bagceci*, Siyasal Katılım Aracı Olarak Referandum: Türkiye ve Avrupa Birliği Uygulamaları* (*Referendum As a Tool For Political Participation: EU and Turkey Practices)* (İstanbul: Oniki Levha Press, 2020), 2–3.
[2] Matt Qvortrup, *The Referendum and Other Essays on Constitutional Politics* (Oxford: UK: Hart Publishing 2019), 8; Matt Qvortrup, "Is the Referendum a Constitutional Safeguard?" // http://www.iandrinstitute.org/docs/Qvortrup-Is-the-Referendum-a-Constitutional-Safeguard-IRI.pdf.

constituent referendums, the present study is specifically concerned with constituent referendums.

Tierney's criticisms, aimed specifically at three main topics within referendums, are most valid in the matter of constituent referendums. Tierney explored those criticisms under the categories of "elite control syndrome", "deliberation deficit", and "majority danger"[3]. "Elite control syndrome" asserts that referendums are an institution open to several manipulations by control owners, mainly the elites, because executive bodies having great authority in identifying the topic and function of referendums and in managing observation and control are also equipped to manipulate referendums to serve their own interests. That is to say, although referendums seem like a good method to check the pulse of democracy, it is quite normal that they are also limited by the views and actions of these elites. "Deliberation deficit" means that instead of reaching a sensible agreement, a referendum is also utilised as a tool to unite predetermined views. In other words, electoral voting is far from reflecting people's freewill because, in reality, electors could never attend forums that should have taken place and could never grasp a chance to form their actual viewpoint. This failure reinforces the belief that citizens vote without awareness. The origin of "majority danger" criticism is based on a fundamental anxiety about the likelihood that referendum practices may lead to the hegemony of the majority. Accordingly, a referendum is not only a weak decision-making method, but at the same time it emerges as a method jeopardising the protection of minority views and interests while representing a majoritarian decision-making model. This is due to the fact that in a referendum, those with 51% of the votes can get everything on the table while the remaining 49% get nothing[4].

Similarly, Sartori reports that main criticism of a referendum is that it has the potential to build the sovereignty of the majority[5]. Accordingly, since a referendum sets a decision-making table with a zero sum, it turns the sovereignty of majority into a boundless gain. A referendum-type decision is a decisive decision that is unique, distinct, and self-contained. Therefore, it becomes difficult to come up with interim formulas specific to the problem. According to Sartori, once the things demanded by individuals are accumulated, it is highly probable that a result not wanted by anyone will come out of that combination. Moreover, Butler and Ranney also criticise referendums as a method of serving the interests of governments. In

[3] Stephen Tierney, *Constitutional Referendums: The Theory and Practice of Republican Deliberation* (Oxford University Press, 2012); Stephen Tierney, "Should the People Decide: Referendums in a Post-Sovereign Age, the Scottish and Catalonian Cases," *Netherlands Journal of Legal Philosophy* Vol. 45, No. 2 (2016): 103–104.
[4] Maija Talvikki Setela, *Theories of Referendum and The Analysis of Agenda-Setting* (ProQuest Publishing, 1997), 21–28.
[5] Gioavanni Sartori, *Return to Democracy Theory*, trans. Tuncer Karamustafaoglu and Mehmet Turhan (Ankara: Yetkin Press, 1996), 127–128.

this case, referendums emerge as a tool which, in general, is used when governments seek to find an effective and functional solution to a specific constitutional or political problem or plan to set legitimacy on regime shift[6]. Likewise, Lijphart argues that governments on the same path tend to employ the referendum method only in situations that they expect to result in their favour[7].

The constituent referendums, as in the making of the 1961 and 1982 Turkish Constitutions, are methods used by the primary constituent powers who re-establish the constitution. For this reason, when it is questioned for what purpose the primary constituent powers prefer this method, the answer is quite significant. This answer will shed light on both determining the democratic value of the referendum in terms of democratic constitution-making and understanding the democratic legitimacy of the constitution adopted as an outcome of the constituent referendum. In fact, the study seeks answers to the following important questions, which are intertwined in the form of a Turkish constitution-making experience in 1961 and 1982: (1) Is the constituent referendum a democratic instrument in terms of constitution-making? (2) Is the constituent referendum an adequate method of establishing and ensuring the legitimacy of the constitution?

Within this framework, the theoretical and practical aspects of (1) the constituent power and constituent referendum during the constitution-making process are explained, (2) the content, scope, and purpose of the constituent referendum are analysed, (3) the differences between a plebiscite and a referendum are discussed. Since the determination of the democratic value of the constituent referendums is closely related to the constitution-making process, the issues in the following sections are analysed by revealing the establishment processes of the 1961 and 1982 Turkish constitutions. In this context, the practices of the Turkish constituent referendum are explained (4), and the making and preparation process of the 1961 constitution, its submission to the referendum, and the legal qualifications of this referendum are evaluated. In the last section (5), the environment in which the constituent referendum took place in the 1982 dated constitution, the preparation of the constitution, its submission to the referendum, and the nature of the laws enacted during this period are revealed.

Ultimately, setting forth their characteristics, it has been concluded that the constituent referendums could not always be considered democratic instruments in terms of constitution-making, and as we witnessed during the 1961 and 1982 Turkish

[6] David Butler and Austin Ranney, "Summing Up": 221-222; in: David Butler and Austin Ranney, eds., *Referendums: A Comparative Study of Practice and Theory* (Washington, DC: American Enterprise Institute for Policy Research, 1978).
[7] Arend Lijphart, *Democracies: Patterns of Majoritarian and Consensus Government in Twenty-One Countries* (New Haven, Conn.: Yale University Press, 1984), 203–204.

constitution-making experiences, they were not adequate and competent to ensure legitimacy for the constitutions that were adopted and entered into force as a consequence.

1. CONSTITUENT POWER AND A REFERENDUM DURING CONSTITUTION-MAKING PROCESS

Constituent powers in general refer to the power source of state and allowing the making of a constitution, forming a discussion topic of amendments, enabling its abolishment in certain instances, creating a legal and political institution with the state in short[8].

The fundamental and ultimate resource of political authority is the general public. Constitutions established by constituent powers also make this a reality[9]. In short, constituent powers in that case help us define the origin and nature of constitutional authority within modern political regimes. So much so that as constitution is accepted as a legal tool deriving its power from public sovereignty and the principle of self-determinant power of people on their future, constitution stands out as a statement of "constituent power"[10]. The constitution-making process inevitably changes the content and form of a constitution, but it still manages to institutionalise the constituent power of the nations, whose existence relies upon the constitution[11].

Similar to Sieyès, Schmitt, who introduced constituent power theory in his 1928 book titled "Verfassungslehre", emphasized that a constitution would not emerge on its own and that it was required to have a constitution-making will with the power to set a constitution[12]. Schmitt claims that a constitution-maker refers to the political free will having tangible and extensive decision-making authority over the type and form of its own power[13].

Constituent power, which allows for the making of major political decisions in that context, has a very different character than the established authority designated by constitutional norms. Indeed, constituent power basically determines and represents the constitutional identity of a democratic political order[14]. Unlike Sieyès, Schmitt accepts constituent power as a tool of free will that can be exercised with no

[8] Erdoğan Teziç, *Anayasa Hukuku* (*Constitutional Law)* (İstanbul: Beta Press, 2019), 177–178.
[9] Martin Loughlin, "On Constituent Power": 151–152; in: Michael W. Dowdle and Micheal Wilkinson, eds., *Constitutionalism Beyond Liberalism* (Cambridge: Cambridge University Press, 2017).
[10] *Ibid.*: 3.
[11] Emmanuel-Joseph Sieyès, *What is the Third Estate?*, trans. M. Blondel (London: Pall Mall Press, 1963 [1789]), 126.
[12] Carl Schmitt, *Constitutional Theory*, trans. J. Seitzer (Duke University Press, 2008 [1928]), 76.
[13] *Ibid*., 125; Yaniv Roznai, *Unconstitutional Constitutional Amendments: A Study of the Nature and Limits of Constitutional Amendment Powers*, A thesis submitted to the Department of Law of the London School of Economics for the degree of Doctor of Philosophy (2014), 86.
[14] *Ibid.*, 86–87.

medium in between [15]. From that viewpoint, it acts as a binding effect on constitutional rules and constitutional powers, whose superiority has been fixed. Kelsen, on the other hand, states that as it is an event taking place outside of legal order, constituent power provides the core of the Grund-norm (Constitution). The author argues that constituent power is not a legal but rather a historical, sociological, and political matter[16].

The primary constituent power is a power that, without sticking to predetermined legal rules, forms a constitution for the first time or rewrites it while preserving its legal and political status. These referendums executed to accept the constitution set by this power are also named constituent referendums; hence, it is assumed that while a new legal order is created, the former version is either abolished or re-emerged by using the basis of a legal gap. However, in the modern age, claiming that the primary constituent power would necessarily emerge when such failure is witnessed in constitutional order implicates that a novel constitution could only be executed in gaps containing only force-use. Clearly, this would be a consequence that could never reflect democratic principles and constitutionalism[17].

Even in situations where constitutional order is absent, international liabilities that bind the primary constituent power, human rights and principles of law continue to exist. Indeed, this approach makes sense when it is required to establish the primary constituent power on a legal rather than an actual ground. What is implied by "legal ground" here is not legality but rather a state of law and rights, which is the dominant attitude of the modern age when elite legal norms are accepted[18].

Negri emphasises that the primary constituent power could not be comprehended from constitutionalism perspective because primary constituent powers reflect a radical character as the will created by a gap and forming all the things which mean they are exempt from all legal statements. Negri argues that the primary constituent power is the "creative work of a power", making all out of nothing and pushing the limits with its strength[19].

It should be noted that, despite its limitless nature, the primary constituent power in general places legitimacy stress on itself and establishes some procedural rules for itself; as a result, the interrelationship between constituent power, legitimacy, and democracy is mirrored in the constitution-making process. In such

[15] Carl Schmitt, *supra* note 12, 128.
[16] Hans Kelsen, *Allegemine Staatslehre* (Berlin: Springer, 1925); Martin Loughlin, *supra* note 9, 163–165.
[17] Ergun Özbudun, *Türk Anayasa Hukuku (Turkish Constitutional Law)* (Ankara: Yetkin Press, 2019), 165.
[18] Hamide Bagceci (Tacir), "Anayasa, Kurucu İktidar Ve Meşruiyet İlişkisi" (Constitution, Founding Authority and Legitimacy Relationship), *Journal of Yeditepe University Faculty of* Law Vol.17, No. 1 (2020): 367.
[19] Antonio Negri, *Insurgencies: Constituent Power and the Modern State* (University of Minnesota Press, 1999), 10–16; Yaniv Roznai, *supra* note 13, 87.

cases, the purpose is mostly not creating democratic participation but rather legitimising the constitution[20].

Defined as grounding everything on reasonable and righteous causes, legitimacy means that sovereign power is deemed fair by its people[21]. Since the extent of obedience of the ruled class depends on the legitimacy of the rulers' power, legitimacy is the main criterion in terms of political power. Accordingly, Lipset claims that political institutions' legitimacy is linked with the ability of existing political bodies to instil and maintain the belief that they are the best choice for the nation[22]. A key function of political legitimacy is to clarify the difference between effective or de facto authority and legitimate authority and also to demonstrate the righteousness of political authority. According to this approach, by separating effectiveness from legitimacy, political authorities enable citizens to act on the basis of existential causes they themselves created. "Effectiveness" or actual authority appears to act in line with these causes, but legitimate authority stands for a legal power that does not fade after displaying those causes but also inherently owns the capacity to change and mould those reasons[23]. In fact, legitimacy depends on the extent of coordination between power and submission that is achieved[24].

Constituent referendums are also used to gain democratic legitimacy for the constitutions that have been accepted, as explained above. However, due to the nature of the referendum tool, this method falls short of securing the democratic constitutional order on its own.

2. CONSTITUENT REFERENDUM

Constitutional referendums can be administered either to adopt a novel constitution or to make amends to the constitutional text. Firstly, referendums used to adopt a novel constitution are generically referred to as constituent referendums[25].

As of the 18th century, the idea that constitutions, which are the highest regulatory and binding norm, act as a social contract gained more popularity, and referendums became a widely-favoured method in a great number of countries[26]. Constituent referendums evolved into a method applied during revolutions, wars, or similar conflicts when the former constitutional order was abolished, and they were

[20] Joel Colon Rios, "The Legitimacy of the Juridical Power, Constituent: Democracy and the Limits of Constitutional Reform," *Osgoode Hall Law Journal* Vol. 48 (2010): 235.
[21] John Sinclair, "Legitimate": 951; in: *Collins Cobuild English Dictionary* (London: Harper Collins Publication, 1995); Metin Çelik, "Avrupa Birliği'nde Yaşanan Meşruiyet Krizi" (Legitimacy Crisis in the EU), *Gazi University School of Economics and Administrative Sciences Journal* (2013): 155.
[22] Seymour Martin Lipset, *Political Man* (Mercury Books, 1963), 87–88.
[23] Joseph Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1986).
[24] Metin Çelik, *supra* note 21: 155.
[25] Hamide Bagceci, *supra* note 1, 208.
[26] İbrahim Şahbaz, *Yarı Doğrudan Demokrasi Kurumu Olarak Referandum ve Tu̇rkiye (Referendum as a Semi-Direct Democracy Institution and Turkey*) (Ankara: Yetkin Press, 2006), 139.

used as a tool to adopt a new constitution. People in such country elect a constituent parliament tasked with constitution-making, and the constitution drafted by this parliament is then presented to the public for final approval[27].

Within that context, the goal of the constituent parliament is to ensure the participation of all political groups in the constitution-making process and actualise the "social contract" established upon the principles of "participation and agreement"[28]. Constituent referendums originated from the belief that constituent parliaments failed to be adequate in ensuring public participation. It relied on the idea that a constitution had to be approved by the general public. The main notion in that view is that by means of a referendum, constitution-making would be perceived as more democratic. In that sense, although the exercise of sovereignty was transferred to representatives, constituents could, as the ruling power, continue exercising the said sovereignty over the referendum[29].

The truth is that, since primary constituent powers acted on behalf of sovereign power, constituent referendums turned into a tool to obtain the collective consent of the general community. Accordingly, sovereign power is endowed with ultimate and absolute authority and can provide the required legitimacy for legal regulations. The primary constituent power of a nation can, by means of a constituent referendum, establish constitutional or, in other words, supra-juridical norms, and therefore usually takes the lead with its creative influences[30].

As of 1974, the main tendency in approximately ¼ of the world's written constitutions was to allow public participation in the design of state constitutions. In a relevant study, it was detected that more than 40% of such constitutions were the either result of referendums or general public voting, and people were included in the constitution-making process in various ways[31]. That being said, the constituent referendum is almost an integral part of the modern constitution-making process, but still, the validity and legitimacy of the constitution are not solely limited public voting because, in the meantime, it also mandates real democratic participation. To put this differently, a referendum should be an actual manifestation of national will during the making of constitutional norms. So much so that Rios mentioned that if democracy means self-governance, in order to achieve that, constitutional norms must be the outcome of national will, but not the collective will of a bunch of secret

[27] Kemal Gözler, *Kurucu İktidar* (*Founding Government)* (Bursa: Ekin Publishing, 2016), 81.
[28] Faruk Bilir, "Anayasa Yapımına Yönelik Değerlendirmeler" (Analyses on Constitution-Making), *Gazi University Law Faculty Journal* (2008): 557–559.
[29] Kemal Gözler, *supra* note 27, 85–86.
[30] Hamide Bagceci, *supra* note 1, 206.
[31] Justin Blount, "Participation in constitutional design": 38; in: Tom Ginsburg and Rosalind Dixon, eds., *Comparative Constitutional Law Participation in Constitutional Design* (Cheltenham: Edward Elgar Publishing, 2011).

names[32]. Otherwise, a constitutional referendum would not be the symbol of democratic constituent power but rather would be an agent for an established authority within the territory of a predetermined constitutional procedure[33]. That would correspond to the fact that without partaking in the actual constitution-making process, citizens would be forced to make decisions among the alternative constitutional provisions[34].

Constituent referendums also reflect the return of power to the nation by virtue of being a direct method of exercising sovereignty. That being said, it not only allows the nation to express themselves and make decisions but also enables the constitutional manifestation of individual identities because, under such circumstances, the adoption of the constitution depends on the final resolution taken at the referendum. Hence, thanks to the referendum, the legal authority of the constitution recognised by a nation derives not from the constituent parliament but directly from the referendum itself[35].

However, while a referendum can be viewed as a democratic tool in general, in cases of constituency, it can easily take on a plebiscitary character, becoming antidemocratic. That is to say, it is likely that constitution-making could actually take place in a fearful and oppressive environment without asking for the consent or participation of the general public. The same threat holds true in situations where the text submitted for the referendum has been written by a parliament not elected by citizens because, in times of turmoil, people are eager to immediately exit this chaotic stage. Signing off on a text written under such circumstances with a simple *Yes* or *No* vote does not necessarily mean that constitution was written in a democratic way[36].

The term "referendum democracy", defined as the participation of frequently mobilised nations in constitution-making processes, is also a great mistake of categorisation when viewed from this perspective[37]. That is because, without considering the way they are created, referendums cannot be categorised as a democratic method. In situations where the constitution presented by a representative constituent parliament can be discussed in a democratic and free setting and when it is viable for citizens who form their views accordingly to manifest their free will while voting, only then can it be feasible to claim that a constituent referendum executes a democratic function. Nevertheless, even under such

[32] Joel Colon Rios, "The Second Dimension of Democracy: The People and Their Constitution," *Baltic Journal of Law and Politics* Vol. 2, No. 2 (2009): 1–11.
[33] Joel Colon Rios, *supra* note 20: 235–237.
[34] Hamide Bagceci, *supra* note 1, 206.
[35] Stephen Tierney, "Constitutional Referendums: A Theoretical Enquiry," *Modern Law Review* Vol. 72, No. 3 (2009): 368-383; Kemal Gözler, *supra* note 27, 87.
[36] Ibrahim Şahbaz, *supra* note 26, 139; Hamide Bagceci, *supra* note 1, 207.
[37] Stephen Tierney, *supra* note 35: 364-383.

circumstances, knowing that the primary constituent power forming the constituent parliament is still an illegal actual power, it becomes essential to question the legitimacy source of the constitution[38].

It is worth remembering that once we take the primary constituent power not as a legal but as an actual source of power use, as a rule, it is infeasible to limit such power with juridical rules. This finding is especially visible in the adoption of the 1961 and 1982-dated Turkish Constitutions, in which administration was seized through non-democratic means. In there, the tie between the referendum and democracy was almost cut; the referendum failed to be a tool to secure legitimacy. This is proven by the fact that despite all the amendments, the desire to create a novel and civil constitution in Turkish Law is still fresh.

3. PLEBISCITE–REFERENDUM DISTINCTION

"Plebiscite" as a term is derived from the Latin words "pleb" and "scitum", and during the 3rd century in antique Greece, it referred to the resolutions and laws adopted by the pleb-class (ordinary citizens)[39]. A concept much older than a referendum, plebiscite also advocates public voting in terms of method; therefore, it becomes harder to set out the legal criteria separating both concepts from one another. Aside from the similarity in method, another factor in its emergence was that in some countries, even democratic public voting was defined as a plebiscite. To a great extent, plebiscitary was seen distant from the widely-accepted negative approach but rather seen as a unique and distinctive expression of the relevant systems. For example, the concept of a plebiscite implies a positive meaning in the constitutions of Austria, Brazil, Chile, Costa Rica, Egypt, Iceland, and the Philippines. Indeed, in relevant research, it was detected that plebiscite and referendum concepts were used interchangeably in the constitutions of 15 countries[40].

Some authors accept that plebiscite and referendum are synonymous concepts[41]. But since it disallows free and fair voting and is heavily controlled by dominant political authorities, it is not feasible to say that plebiscite and referendum are identical concepts[42]. In that case, a plebiscite is more like a degenerated form of a referendum, and despite being executed via the same method, it does not serve as a democratic method considering its ultimate goal. In a plebiscite that, in principle,

[38] Hamide Bagceci, *supra* note 1, 207.
[39] See Etymology Dictionary, Online Etymology Dictionary // https://www.merriam-webster.com/dictionary/referendum.
[40] Markku Suksi, *Bringing in the People* (London: Martinus Hijnoff Publishers, 1993), 138–139.
[41] Lynn A. Baker, "Direct Democracy and Discrimination: A Public Choice Perspective," *Chicago-Kent Law Review* Vol. 67 (1991): 707-715; İlker Gökhan Şen, *Doğrudan Demokrasi* (*Direct Democracy)* (İstanbul: Oniki Levha Press, 2013), 24.
[42] Yves Beigbeder, "Referendum": 696-706; in: *Heidelberg: Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2012).

finds existence in an undemocratic practice from the pre-voting to post-voting stages, the nation is pushed into a passive status. In this system, individual power holders or actual administrations resort to public voting to gain self-legitimacy through anti-democratic means. People enter this process in the last stage, mostly out of necessity[43]. From this aspect, the referendums utilised during the adoption of the constitutions stand out with their plebiscite qualities. The plebiscite nature of constituent referendums becomes evident, especially when the power is seized unlawfully and the need to endow legal characteristics to the de facto powers is felt. Given that a referendum was designed to ensure the direct participation of people in administration, a plebiscite that occurs after this goal has been lost cannot be considered a type of referendum[44]. That is due to the fact that plebiscite quality occurs mostly when a tool and voting method are used to empower political power, a specific political establishment, or the policy of the ruling authority[45]. Möckli defines a plebiscite as case-specific ad-hoc referendums that authorities put into practice to serve their interests in the best way[46]. In the 19th century Napoleon-age practices[47], when Fascism reached its peak in Europe in Italy, Austria, Hitler Germany[48] and De Gaulle's France, and votes taking place in Eastern and Central Europe during Cold War Era can reasonably be described as largely demonstrating plebiscite character[49].

One of the main reasons for this is that, despite its democratic appearance in reality, this method is exploited by an all-powerful name or names in an attempt to establish or strengthen an authority regime[50]. In that sense, voting, which is used to gain trust in a political power, primarily served the interests of one individual or the political practises of that individual, and was especially performed during the primary constituency steps. That is because public voting held under these circumstances is

[43] Kemal Gözler, *Türk Anayasa Hukuku Dersleri (Turkish Constitution Law Lesson)* (Bursa: Ekin Publishing, 2019), 99.
[44] Adamson S. Norman and Sarfo Kantanka Kwadwo, "The Role of Referendum: A Case of Ghana," *African Journal of History and Culture* Vol.1, No.1 (2009): 1.
[45] Matt Qvortrup, *supra* note 2: 34–39.
[46] Silvano Möckli, *Direkte Demokratie. Einintemationaler Vergleich* (Bern: Verlag Paul Haupt, 1994), 127-130; Silvano Möckli, "Direct Democracy in Nine Countries: A Survey," Paper presented at the conference "Democrazie e referendum", Societt Italiana di Studi Elettorali, IV. Convengno Internazionale (Prato, October 3-5, 1991): 2 // https://www.alexandria.unisg.ch/251611/1/Silvano%20Moeckli%20Direct%20Democracy%20in%20Nine%20Countries.pdf.
[47] "It was through plebiscite that Napolion obtained emperorship and consulate authorities, elected as President in 1848 and ensuing 1851-dated intervention he was crowned" (Malcolm Crook, "Ma volonte est celle du peuple: Voting in the Plebiscite and Parliamentary Elections During Napoleon's Hundred Days. April-May 1815," *French Historical Studies* Vol. 32 (4) (2009): 619–645.
[48] "Hitler, in 1933 exited League of Nations and Conference on Disarmament, upon the death of Hindenburg in 1934, Plebiscite enabled to unite State Presidency and Chancellory powers in the Führer" (Ibrahim Şahbaz, *supra* note 26, 97; Nico Voigtlander and Hans Joanchim Voth, "Highway to Hitler,", National Bureau of Economic Research, *Working Paper* 20150 (2014):11–12.
[49] Pier Vincenzo Uleri, "Introduction": 1–20; in: Michale Gallagher and Pier Vincenzo Uleri, eds., *The Referendum Experience in Europe* (Macmillan Publishers, 1996); TBMM Research Center, "Bir Doğrudan Demokrasi Aracı Olarak Referandum Uygulama Örnekleri" (As a Direct tool for Democracy Cases on Referendum Practices): 66; in: Ahmet Yıldız, Ercan Durdular, Mehmet Solak, and Hüdai Şencan, eds., *Turkey-USA-Europe Case Models* (Ankara: TBMM Press 2010).
[50] Matt Qvortrup, *supra* note 2: 34–46.

the most favourable method for power holders to ostracize general public and attain a result to serve their best interests without causing a conflicting setting[51].

At first glance, plebiscite-natured voting appears to be the reflection of people whose free-will and opinion are revered, discussing in a free environment where forum channels are open despite standing against the text voted[52]. Nonetheless, in reality, the truth might be just the opposite. Political forums and propaganda have been banned or biased, and in that case, the general public cannot exhibit their free will by stating their opinion on the topic of a voted text or during the preparation stage of the text[53].

The free will of ostracised people was turned into a form to serve the interests of rulers through their manipulation, which was the final outcome. In such voting, neither the electors nor the choices are free, so that in most cases, this voting turns into a simple choice between being governed and ungoverned, or between chaos and order[54]. In the opinion of the author of this paper, this scenario is evident specifically in the primary constituency stages when legitimisation methods are reapplied by constitution makers. Hence governors are the ones to decide on the referendum setting, referendum question, and the referendum timing, and from this perspective, the likelihood of the referendum being misused by administrations forms one of the greatest conflicts breaking out while determining the democratic character of the method.

Gözler describes a plebiscite such; in a certain period, actual power holders submit to voting the draft of their own constitution without preparing a discussion forum but rather collecting the votes in blocks of "yes" or "no", and he explains the underlying differences between a referendum and a plebiscite as follows:

> In Referendum there is a "problem", in plebiscite there is one "man". In the first option a text is voted while in the second one a name is voted. Referendum is a democratic model: People are active agents, they are the subject; they are involved in the beginning, middle and end of decision-making process. Plebiscite, on the other hand, is an anti-democratic model where people are passive, and people are the object but not the subject; they participate only to the last stage of decision-making process. They are representatives selected by people and calling for a referendum and what is being voted is the text written by public representatives whereas those applying to plebiscitary are the real owners of actual power.

[51] Hamide Bagceci, *supra* note 1, 158.
[52] Ibrahim Şahbaz, *supra* note 26, 95.
[53] Hamide Bagceci, *supra* note 1, 158–159.
[54] Ibrahim Şahbaz, *supra* note 26, 98; Suheyl Batum, *Siyasal Katılma Biçimi Olarak Referendum*, (*Referendum as a Political Participation Method)*, Unpublished PhD Thesis (Istanbul: Istanbul University Institute of Social Sciences, 1986), 338.

> What they vote is the texts prepared without public participation; they are accompli, resolutions and actions of actual administrations.[55]

In that sense, in an analysis based on the quality of a plebiscite, two main criteria come out. The first is whether or not a text to be voted on would reflect people's free will or whether or not the nation had any influence. The second criterion is the actual setting created in the voting process of a text, for example, by putting the general public under pressure. On the other hand, despite being outside the scope of our research, the plebiscite concept has also been named as a method in international legal terminology used by states to determine their own future[56].

It should be indicated that the plebiscite quality is not a criterion exclusively specific to constituent referendums. There are other types of referendums, such as a constitutional amendment referendum, a statutory referendum, an initiative referendum etc[57]. They may also hold plebiscite qualifications. Either a statutory referendum, a constitutional amendment referendum, or an independence referendum can be held in an undemocratic setting where political participation is prevented, various propaganda bans are imposed, and public opinion is suppressed[58]. Under these circumstances, it is possible to make reference to the plebiscite character of the referendum[59].

The constituent referendum differs from the others at this stage. Because, in principle, derived constituent powers are those who initiate referendums other than the constituent referendum. Derived constituent powers are those that are juridically limited to the relevant constitutional legal order. Therefore, referendums in terms of types other than the constituent referendum, in other words, referendums initiated by the derived constituent powers, may be democratic instruments in ensuring political participation, depending on the development of the democratic culture, and can provide the legitimacy of the relevant regulation. If they fail to do so exceptionally, they are likely to take on a plebiscite character. On the other hand, as mentioned before, since constituent referendums were held in the capacity of the primary constituent power, the tendency to demonstrate a plebiscite nature was more evident from the beginning. For this reason, the environment and method in which the constituent referendums were held must be questioned. As emphasised above, it is definitely noteworthy that plebiscite qualifications may occur at different levels since a plebiscite is not a type of referendum but a criterion for determining

[55] Kemal Gözler, *supra* note 43, 87-92.
[56] For extended insight on international law on a plebiscite, please see Sarah Wambaugh, *A Monograph on Plebiscites with a Collection of Official Documents* (Oxford University Press, 1920).
[57] Richard Braunstein, *Initiative and Referendum Voting: Governing Through Direct Democracy in the United States* (LFB Scholarly Publishing LLC, 2004), 53–60.
[58] Matt Qvortrup, *supra* note 2, 49–51.
[59] For referendums of this type, please see Shauna Reilly, *supra* note 1, 126–138.

the quality of the voting that took place. Just as the plebiscite qualification of the 1961 Turkish Constitution was less apparent than the 1982 Turkish Constitution.

4. CONSTITUENT REFERENDUMS IN TURKISH CONSTITUTION LAW: 1961 AND 1982-DATED CONSTITUTION-MAKING PROCESS

In Turkey, until the making of the 1961 Constitution, neither during the reign of the Ottoman Empire nor the Republican Period, was a referendum held on any given topic. The referendum method was first used in Turkish law in 1961, and it was later included in the 1982-dated Constitution when regulations became more permanent. In the 1982-dated Constitution, the referendum method was adopted but limited to constitutional amendments (clause 175), and methods to open the way for public interventions and public proposals were yet left unattended. Therefore, it can be argued that in essence referendum was not aimed at allowing public participation but mostly suggested as a method to solve potential conflicts between state bodies. Including constituent referendums, a total of seven referendums have been held so far in Turkey[60].

4.1. MAKING OF THE 1961-DATED CONSTITUTION AND LAW NO. 157

The 1961-dated Constitution was written in the aftermath of 27 May 1960 military coup. The National Unity Committee (NUC) having seized the government, adopted the title of primary constituent power and envisaged writing a new constitution with the claim of stabilising political life. Since the ruling class was changed by force rather than election, legitimacy of emergent constitution was put under shadow to a great extent[61].

Through this military intervention, all types of political actions were banned, parliament and civilian government were ousted, and in order to create a short-term constitutional order, the NUC effectuated the "Provisional Law on Annulling Certain Clauses in Constitution and Amending Certain Decrees"[62]. This Law was classified as a provisional constitution, and during this interim period it was administered in coordination with effective regulations of the 1924-dated Constitution. According to clause 1 of the Law:

> National Unity Committee, new Constitution and Election Law will be adopted as per democratic procedures and in the general elections which will immediately be held in accordance with the new law, Turkish Grand National Assembly will be

[60] TBMM Research Center, *supra* note 49: 90; Orhan Aldıkaçtı, *Anayasa Hukukumuzun Gelişmesi ve 1961 Anayasası* (*Development of Constitution Law 1961 Constitution)* (İstanbul: Yenilik Press, 1973): 130–133.
[61] Hamide Bagceci, *supra* note 1, 304.
[62] *TBMM Presidency, Law No: 1, Resolution Date: 12.06.1960*, Official Gazette: 14.06.1960/10525.

established and until the time power is delegated to the new Assembly, provisional government will be in charge of executing sovereignty on behalf of Turkish Nation". Based on the legislation stipulating that "All entitlements granted to Turkish Grand National Assembly as per Constitution Law are, for the interim period only, transferred to National Unity Committee (NUC)".[63]

In the subsequent stage, it was resolved to form a Constituent Parliament to create the new constitution. According to Law No. 157, it was proposed that the Constituent Parliament would consist of the NUC and the House of Representatives (HoR), which would be formed according to this Law. Within this framework, the Constituent Parliament practice, which was for the first time applied in 1960-1961, was aimed directly at creating a new constitution[64].

The HoR is not a parliament structured upon general ballot method. Aside from provincial representatives and political party representatives, it consisted of the names of those who would be elected step by step out of the establishments proposed in the effective law (clause 4/a). Electable names were specified as bar representatives, press delegates, former representatives of Combat Units, representatives of craftsmen associations, youth representatives, delegates of labour unions, delegates of trade chambers, representatives of teacher associations, representatives of agriculture societies, university representatives, and representatives of judicial bodies. In order to be eligible to be a member of the HoR, required conditions were set as being above age 25, having a high school or relevant educational institute diploma at minimum, whereas for representatives of agriculture, craftsmen, and labour unions, being an elementary school graduate was deemed sufficient[65].

Within that context, it is reasonable to claim that the HoR is made up of individuals forming a specific social segment, but still, it is worth admitting that there is partial representation all in all. Indeed, as per clause 1 of the Law: "With an aim to establish a Legal State and represent in its widest sense the whole nation in accordance with prevailing conditions and it consists of the House of Representatives that would be founded as per the provisions stated by this Law". Since delegates of the banned Democrat Party (DP) were excluded from the representatives group the

[63] Some other regulations listed in the Law are as follows:
- National Unity Committee exercises legislative power directly on its own and executive power via the Cabinet appointed by the State President and approved by the Committee (cl. 3).
- National Unity Committee is entitled to audit and fire the Ministers any given time (cl. 4).
- Once the Provisional Grand National Assembly is established after the general elections National Unity Committees annulled and will thus automatically dispersed after losing its legal status (cl. 8).

[64] See Turkish Grand National Assembly Presidency // https://anayasa.tbmm.gov.tr/1961.aspx; *Law No: 157, Resolution Date: 12.12.1960*, Official Gazette :16.12.1960/10682

[65] In the HoR, representatives of only two political parties are seated since others have been prohibited. These parties were Republican People's Party led by İsmet İnönü and Republican Peasant's Party led by Osman Bölükbaşı.

vast majority of people were unable to express their opinions, resulting in a lack of full representation [66].

As democratic constitution-making models are examined in the article, it can be noted that the existence of a Constituent Parliament alone does not necessarily indicate that this constitution was built upon democratic procedures. The Constituent Parliament's democratic nature stems from its representative power during the construction stage, and at this point, the significance of electing Constituent Delegates via election stands out as a vital method. When there was the NUC on one side and a group of delegates with incomplete powers of full representation on the other side, it was not sufficient to secure the legitimacy of the constitution[67].

4.2. VIEWS ON THE REFERENDUM

In the period when the referendum was held, there were disputes over whether or not citizens had a sufficient level of knowledge about the novelties introduced by the 1961-dated Constitution and its context in general[68]. In that sense, considering that a large portion of the population resided in rural areas and had low literacy levels, it was claimed that understanding the referendum question was far from easy. Besides, that method was a very first time experienced in the political history of Turkey. It was thought unlikely that the electorate, whose party had been disbanded, could have answered the referendum question without the influence of political terms[69].

Moreover, the makers of the constitution also advocated that in terms of democratic stance, the referendum method failed to be adequate, and they argued that although it was viable to legalise a text after its voting by a referendum, that would not have necessarily added a democratic character to the constitution, since this was a method basically administered in oppressive systems[70].

Because the elector has no freedom to discuss or change the text that has been presented in this method, they would either accept it as a whole or reject it from scratch, which means that because the nation was pressed by the fear of not meeting a democratic regime, they would have to vote under moral pressure. In reality, democracy requires not to vote for a resolution but it also calls for deciding on the context of the resolution under question. Accordingly, those making the most accurate decisions on political issues would once again be those personally engaged

[66] Bülent Tanör, *Osmanlı Türk Anayasal Gelişmeleri* (*Ottoman-Turkish Constitution Developments)* (İstanbul: Yapı Kredi Press, 2011), 372.
[67] *Ibid*., 71.
[68] Bener Karakartal, "Bir Siyasal bir Siyasal Katılma Türü Olarak Referandum ve 1961 Türk Anayasa Referandumu" (Referendum as a Type of Political Participation and 1961-dated Turkish Constitution Referendum), *Istanbul University Journal of the Faculty of Economics* Vol. 38, No. 3-4 (2011): 168–169.
[69] Hamide Bagceci, *supra* note 1, 302–303.
[70] *Ibid*., 309.

in politics. Thus, a constitution should be designed not via a referendum but rather by a national parliament appointed by the people themselves[71]. Indeed, according to the Commission, which had written the Law No. 157 , presenting the constitution to public voting conflicted with the principle of national sovereignty, which had been effective since the 1921-dated Constitution. In the preparation stage of the 1961-dated Constitution there would be no need for a referendum since the Constituent Parliament elected by people represented the free will of Turkish nation, though indirectly[72].

The main justification asserted by the advocates of a referendum was structured on the basis of legitimacy concerns, and within that framework, they claimed that a referendum was a tool that allowed citizens to return to political life. In that scenario, a referendum is a method promoting mutual agreement, and that is the preliminary condition to ensure the continuance of a constitution. Moreover, it was emphasised that the potential conflict due to the exclusion of DP from the process could be corrected via a referendum, and this attitude could, by empowering the constitution's legal status in the future, make major contributions to its development. Accordingly, a constituent referendum, which is a manifestation of mass decision-making, would magnify the legitimacy and applicability of the constitution. Despite that, this is an approach that has no meaning in situations where the Constituent Parliament lacks a representative character[73].

4.3. SUBMISSION OF THE 1961-DATED CONSTITUTION FOR REFERENDUM

In submitting the constitution to referendum, provisions under Law No. 283 were administered, and all preparations for voting were executed through the YSK (Supreme Election Board)[74].

In line with that, on 9 July 1961, general public went to the polls to vote in the referendum, and in the voting process, 61.5% of valid votes were counted as "Yes" 38.5%, as "No"[75]. A new Constitution was adopted and subsequently, on 15 October

[71] Siyasal Bilgiler Fakültesi Gerekçeli Anayasa Tasarısı, Ankara Üniversitesi Siyasal Bilgiler Fakültesi Yayınları (Institute of Administration Sciences Views on Justified Constitutional Draft and Election Method), Ankara University, *Political Sciences Publications* (1960): 4–5.
[72] Orhan Aldıkaçtı, *supra* note 60, 145.
[73] Ibrahim Şahbaz, *supra* note 26, 249; Siyasal Bilgiler Fakültesi Gerekçeli Anayasa Tasarısı, Ankara Üniversitesi Siyasal Bilgiler Fakültesi Yayınları, *supra* note 71: 9–10.
[74] Via Law No. 5545 dated 16.02.1950 on the Election of Delegates elections, polls were set in cities and districts and in order to assign in Ankara, the Supreme Election Board was established. This Law No. 5545 was abolished upon the effectuating of 26/4/1961-dated Law No. 298.
[75] Issued by the YSK (Supreme Election Board) and resolution No. 106 dated 19 July 1961 on Final Results for Submission of Committee to Referendum is such: Total sum of electors 12.735.009. Total sum of electors participating in referendum: 10.322.169. Number of valid votes: 10.282.561. Number of "Yes" voters 6.348.191, Number of "No" voters; 3.394.370 (Supreme Election Board Decree, S.10859, Resolution Date: 20.06.1961, Tercüman Newspaper, No.29(7), (11.07.1961)).

1961, general elections were held. On 25 October 1961, 12th-term TBMM was convened, and transition to normal political regime was thus completed[76].

A key feature of the 1961-dated referendum was the high ratio of public participation, which was reported to gradually decrease in each election after 1950. The participation ratio was measured at 81%. The second feature witnessed in the 1961-dated referendum was that the ratio of "No" votes was higher than expected. Irrespective of large-scale propagandas in favour of the Constitution, 38,3% of all electors could vote "No" for the Constitution. An analysis as per cities indicates that 11 cities rejected the Constitution[77].

In that sense, although throughout the entire process the NUC exhibited its full effect and views of DP were left unrepresented, electors could vote "No" in a high ratio. That validates that the 1961-dated Constitution cannot be accepted as a social contract structured upon the agreement of the vast majority of people. In that process, the high ratio of reported negative votes can be explained by the fact that DP supporters were excluded and the terms of voting were much freer compared to the construction process of the 1982-dated Constitution[78].

4.4. LEGAL NATURE OF REFERENDUM ON 1961-DATED CONSTITUTION

This referendum, acting as the constituent element of the 1961-dated Constitution, was a referendum having both mandatory and approval features. Since it emerged without the essence of a constitutional ground upon the legitimacy search of military regime and depended upon provisional regulations, it was also viable to be discussed as an ad hoc referendum[79].

Despite having a high ratio of participation, the extent of the 1961-dated referendum's representation of people's views in the participation process is open to discussion. It is difficult to discuss the existence of democratic participation in an era when military power dominated and all parties' opinions were silenced. To ensure a democratic and fair referendum process, initially, no pressure should be exerted on the public. Information channels should be open and favourable for discussions, referendum holders should remain unbiased to a certain extent, equality of opportunity should prevail in referendum campaigns and propaganda, and every opinion should be represented thoroughly. In that sense, considering that the 1961-dated referendum was designed by a semi-representative Constituent Parliament, it

[76] Bulent Tanör, *supra* note 66, 375.
[77] Bener Karakartal, *supra* note 70: 174–175; Orhan Aldıkaçtı, *supra* note 60, 147.
[78] Erun Özbudun, *supra* note 17, 44-46; Bulent Tanör, *supra* note 66, 376; Fazıl Saglam, *Anayasa Hukuku Ders Notları (Constitutional Law Lecture Notes*) (Nicosia: Near East University Publications, 2013), 238.
[79] Mehmet Şener Gül, *Anayasa Hukuku Açısından Kurucu Referandum (Constituent Referendum with Respect to Constitution Law)*, Unpublished Master's Thesis (Ankara: Ankara University, Institute of Social Sciences, 2000), 562; TBMM Research Center, *supra* note 49: 91.

is not easy to detect whether or not an actual autonomous referendum practice was formed. And if so, the question arises as to what extent an autonomous referendum could be actualised[80].

On the other hand, one of the most salient criteria in determining the autonomy of referendum practice is results of the referendum. When evaluated from this view, despite all its negations, the 1961-dated Constitution implicates an environment in which the general public could still vote "No", and this demonstrates the presence of a relatively free environment. In fact, in the 1982-dated Constitution era, this ratio equalled 91% of "Yes" votes, thereby falling to an almost zero level. Accordingly, applied for the first time in Turkish history, the referendum accomplished no democratic function. It took place within the framework of current political and economic conditions; it could not go beyond being a simple manifestation of such discussions[81].

5. THE 1982-DATED CONSTITUTION PERIOD

Similar to the 1961-dated Constitution, the 1982-dated Constitution also emerged after a military intervention. The National Security Council (MGK) formed after seizing of power on 12 September 1980 and from thence acted as the primary constituent power and created a new constitution from scratch. Upon this military intervention, all kinds of political acts were banned in Turkey, and the Turkish Grand National Assembly (TBMM) and ruling government were ousted. The 1961-dated Constitution and regulations in its amendments were derogated[82].

The legal framework of the novel regime emerging with the military intervention of September 12 was determined via "Law on Constitution Order" No. 2324 approved by the MGK[83]. The Law stipulated that duties and authorities formerly assigned to the TBMM, the National Parliament, and the Republican Senate would be transferred to MGK, and Presidential duties and authorities would be transferred to the Head of MGK (clause 2). Besides, among the provisions stated/to be stated in the MGK declarations and decrees and among the regulations published and to be published by the Council (MGK) the clauses deviating from the provisions of the 1961-dated Constitution, constitutional amendments, and clauses deviating from effective Law were also accepted as Law amendments (clause 7). Therefore MGK could assume all authorities in its own body; the 1961-dated Constitution was thus tacitly repelled, and essential steps were thus taken to design a new constitution[84].

[80] Hamide Bagceci, *supra* note 1, 312.
[81] *Ibid*., 312--313; Bulent Tanör, *supra* note 66, 88–90.
[82] *Ibid*., 87–88.
[83] *Law No: 2324, Resolution Date: 27.10.1980*, Official Gazette: 28.10.1980/12145.
[84] Fazil Saglam, *supra* note 78, 251–253; Hamide Bagceci, *supra* note 1, 313–314.

5.1. PREPARING THE 1982-DATED CONSTITUTION AND LAW NO. 2485

During the era of the 1982-dated Constitution MGK followed a path similar to the experiences in the 1961-dated Constitution. The constitution-making duty was envisaged to be transferred to the Constituent Parliament and to make it viable "Law No 2485 on the Constituent Parliament" was enacted, and accordingly, the Constituent Parliament consisted of MGK and the Advisory Council (AC) (clause 1). Similar to the 1961-dated Constitution, the Constituent Parliament was composed of two wings, one of which represented the military and the other, civilians. Yet weakness of the civilian wing, or in other words, failure of the form and effect of the AC's design, minimal power of representation placed the Constitution in a worse status than the HoR in 1961-dated Constitution. It is because out of 160 members in the AC, 120 members were selected by MGK out of candidates proposed by all provinces, whereas 40 members were directly elected by MGK (clause 3). Approval of the proposed text was bound to the approval of MGK[85].

In short, MGK had the right to amend a text if it wanted to do so and to say the last word on a decree (clause 26 of Law No. 2485). For instance, one of the significant limits enforced on members of the AC was the following: "Not being the member of any political party on September 11, 1980 date" (clause 4/g). Within that scope, one week before the opening of the AC, all political parties were terminated, and upon the ban on politics in general in 1980, all types of political acts were halted; the AC, whose members were appointed by MGK, was then completely filled with non-partisan members[86].

To sum up, in addition to lacking a legal nature of representation, the AC was also far from symbolising the real conditions of society in terms of practical and sociological dimensions. On that account, for the 1982-dated Constitution, the applicable term was chosen not as the "Constituent Parliament" but as the "actual constituent power"[87].

5.2. PRESENTING THE 1982-DATED CONSTITUTION TO THE REFERENDUM

Political bans imposed on the members of annulled parties upon the referendum of the 1982-dated Constitution were then softened upon the enactment of MGK Decree No. 65; hence, it became feasible for non-administrative members of the parties to speak out their voices, though limited with certain boundaries. However, although

[85] Bulent Tanör, *supra* note 66, 88–103.
[86] Bülent Tanör, *Two Constitutions* (İstanbul: Oniki Levha Press, 2013), 92.
[87] *Ibid.*, 92–93; Hamide Bagceci, *supra* note 1, 314.

the Decree No. 65 partly opened the way for freedom of expression, it failed to provide a setting conducive to sharing negative opinions. Indeed, subsequent to this Decree, MGK enacted the Decree No. 70[88] in order to prevent the opposite propaganda. Through this act, it was banned for the members of annulled political parties to state their opinions on the new constitution, declare written or verbal statements on the political and juridical state of Turkey[89].

This approach continued with the regulations enacted to conduct the referendum. In parallel with that, according to the regulation in clause 5/c, which restricted freedom of propaganda, and Law No. 2707, principles related to publicising and explaining the Constitution to citizens via several methods and channels would only be selected and controlled by the National Security Council. Via this regulation, MGK clarified the impossibility of voting "yes" or "no", but on 21 October 1982, the Council signed a new deal that expanded the ban on propaganda under Decree No. 71, which underlined that: "provisional clauses of this Constitution written and updated to ensure a healthier and safer transition to parliamentarian democratic regime as well as speeches made by the President of Turkey on radio and TV and domestic tours to publicize the Constitution will, under no circumstances, be criticized or opposed in written or verbal statements whatsoever". Clearly, the constitutional text could no longer be contested in any way[90].

In addition, so as to prevent the risk of lower participation as a result of all these bans, sanctions were imposed on Law No. 2707 against non-voters. That is, "without any legal or actual alibi, those not attending the referendum will not be eligible to participate for a consecutive five-year period after the voting of Constitution to any of the general and mid-term elections, local elections and any other elections and will not either run for candidacy" (clause 12). The 1982-dated Constitution was submitted under these conditions on 7 November 1982, and with a high participation ratio of 91,2%, the referendum was approved after collecting 91,3% "yes'" votes[91].

5.3. LEGAL NATURE OF THE 1982-DATED CONSTITUTION REFERENDUM

The referendum for the 1982-dated Constitution was mandatory and binding in terms of its consequences. It is at the same time an ad hoc text similar to the 1961-dated

[88] *Law No. 70*, Official Gazette: 05.08.1982 /17773.
[89] *Ibid*.
[90] TBMM Research Center, *supra* note 49: 125.
[91] Result of the final referendum as per Supreme Election Board Decree No 444, dated 9 Nov. 1982 on the Referendum of Provisional Turkish Constitution: Registered voters: 20.722,602, voting electors: 18.718,115 (91,27%), valid votes: 18.600.313, approval: 16.945.545 (91,37%), red: 1.594.761 (8,63%) (see https://anayasa.tbmm.gov.tr/1982 aspx, E. 22.02.2020; TBMM Research Center, *supra* note 49: 125; *YSK Law No: 458*, Official Gazette: 20.11.1982/17874).

Constitution because it emerged specific to a range of regulations enforced by the actual power holders, also defined as the primary constituent power. In addition, the 1982-dated Constitution referendum cannot be associated with democratic constitution-making because here the goal is not to seek the reference of the nation but to gain legitimacy for the Constitution[92].

In the stage of submitting the 1982-dated Constitution to the referendum, the finding stated above becomes even more visible considering the prevalent atmosphere at that time. In a period when military authority ruled the national parliament and the government was annulled, regulations in favour of pluralistic structure were eradicated, and political acts were banned. In the constitution-making process when MGK had the right of saying the last word, it was not envisioned what could happen if the Constitution to be voted on was not accepted. Leaving such a critical condition under darkness fuelled the fear that military authority would last longer. On the other hand, introducing propaganda bans and not criticising constitution publicity speeches were the greatest impediments to flourishing of different opinions within a democratic and autonomous setting[93].

Aside from that, in the ad hoc clause 1 of the Constitution, it was suggested that in the case of approving the Constitution, the State President on the referendum date would be re-elected for a seven-year term with the President title. Thus, once the nation voted "yes" for the Constitution, they would automatically select the President as the election for the Constitution and the Presidency office was united in one election. Voters were once again pushed towards a dire situation because in referendums, the main principle is uniformity in the text to vote for and discussing only one single problem in voting. Otherwise, the electors would go to the polls reluctantly, and that would be a total violation of the spirit of the referendum. In such circumstances, it is not possible for the electorate, which leans towards one of the issues but does not support the other, to reflect the real will[94].

It has been stated that the 1982 Constitutional vote has a plebiscite quality in substantial terms, but it has the characteristics of a referendum institution as it aims at the transition to a democratic regime in terms of intention. It has been reported that it manifested the features of a referendum establishment[95].

It can be argued that it is quite difficult to establish the link between the emergent result in such situations and the referendum. Although all of the components of a plebiscite were present in the adoption of the Constitution, the only feature to associate with a referendum is that it was conducted through public voting.

[92] Hamide Bagceci, *supra* note 1, 316.
[93] Bulent Tanör, *supra* note 66: 94-101; Fazil Saglam, *supra* note 78, 251–252.
[94] Bulent Tanör, *supra* note 66: 95.
[95] Ibrahim Şahbaz, *supra* note 26, 265.

For this reason, it can be asserted that the referendum does not contribute to a democratic environment, but in some cases, even plebiscitary voting can be effective in transitioning to a democratic environment. Yet this effect is no more than a formal and conceptual one after all.

CONCLUSIONS

A referendum is an important political participation instrument that enables the people to express their views and reflect their will before the government. Indeed, the arbitration of the people as the holders of sovereignty is a factor that consolidates legitimacy in resolving controversial issues and contributes to the establishment of the social contract. From this aspect, once it is desired to find a useful and effective solution to a certain constitutional or political problem, a referendum emerges as a democratic instrument of political participation. However, this benefit is only possible in a democratic environment. In other words, referendums will become functional in places where political intentions and benefits can be avoided, minority views excluded from the referendum can be protected, and a free and liberal public opinion can exist.

When it takes place in an anti-democratic environment, the plebiscite qualifications of the referendum are the most important factors that adversely affect the referendum-democracy relationship. The more the plebiscitary quality of a referendum enhances, the less democratic legitimacy it will provide. This is particularly evident with regard to constituent referendums, because in constituent referendums, the constitution makers are the primary constituent powers. As a rule, since there is no legal order that restrains the primary constituent powers, the aim that leads them to make a democratic constitution is primarily the concern of legitimacy.

When the primary constituent powers, acting in accordance with this concern for legitimacy, head towards democratic instruments to persuade the public, one of the most convenient instruments they encounter is the constituent referendum, as it represents reconciliation and consensus. As a matter of fact, the fact that the constituent referendum method, which was not included in the Turkish constitutional system before, was adopted for the first time in the 1961 Constitution period and later in the 1982 Constitution period, can be explained in light of this idea.

However, the nature of a constituent referendum and whether it can provide and ensure genuine legitimacy for the constitution are closely related to how the democratic process works. Especially when held in anti-democratic environments, constituent referendums will deviate from being a democratic instrument in terms of constitution-making. Within this framework, the two constituent referendum

examples in the Turkish constitutional system are significant in terms of revealing these determinations. In both cases, the constituent referendums were based on the de facto power attained as a result of the intervention in the government and could not transcend a limited form directed by the military political authority. For this reason, the anticipated democratic outcome from the constituent referendum could not be achieved, hence the constitutions fell short of gaining adequate legitimacy.

It is possible to embody the main reasons for this as (1) the fact that the capacity of the primary constituent was attained by interfering with the government, (2) the constitutional drafts submitted to the referendum were prepared by the Constituent Assemblies, which were not fully authorised to represent, and (3) the environment in which the constituent referendum was held was not free and liberated. As a matter of fact, both at the time of the 1961 Constitution and the 1982 Constitution, the existence of factors such as the suppression of regulations that would ensure a pluralistic social structure, the restrainment of political activities, the unpredictability of what would happen if the constitution to be submitted to the referendum were not accepted, and the introduction of propaganda bans adversely affected the democratic nature and legitimacy of the constituent referendums.

In cases where the will of the people is not reflected in the constitution at all or is reflected in a considerably limited manner during the constitution-making stage, the link between democracy and referendum is dissolved, the plebiscitary qualification of the voting enhances, and thus the democratic legitimacy expected from the constituent referendums gradually weakens. As a matter of fact, the fact that the desire to make a new and civil constitution in Turkish law is still alive despite the many amendments it has undergone is an important proof/indicator of this situation.

BIBLIOGRAPHY

1. Aldıkaçtı, Orhan. *Anayasa Hukukumuzun Gelişmesi ve 1961 Anayasası* (*Development of Constitution Law 1961 Constitution)*. İstanbul: Yenilik Press, 1973.
2. Bagceci (Tacir), Hamide. "Anayasa, Kurucu İktidar Ve Meşruiyet İlişkisi" (Constitution, Founding Authority and Legitimacy Relationship). *Journal of Yeditepe University Faculty of Law* Vol.17, No. 1 (2020): 339–384.
3. Bagceci, Hamide. *Siyasal Katılım Aracı Olarak Referandum: Türkiye ve Avrupa Birliği Uygulamaları* (*Referendum As a Tool For Political Participation: EU and Turkey Practices)*. İstanbul: Oniki Levha Press, 2020.

4. Baker, Lynn A. "Direct Democracy and Discrimination: A Public Choice Perspective." *Chicago-Kent Law Review* Vol. 67 (1991): 708–775.
5. Batum, Süheyl. *Siyasal Katılma Biçimi Olarak Referendum* (*Referendum as a Political Participation Method)*. Unpublished PhD Thesis. İstanbul: İstanbul University Institute of Social Sciences, 1986.
6. Beigbeder, Yves. "Referendum": 696–706. In: *Heidelberg: Max Planck Encyclopedia of Public International Law*. Oxford University Press, 2012.
7. Belko, Marian, and Lubomir Kopecek. "Referendum in theory and practice: the history of the Slovak referendums and their consequences." *Stredoevropske politicke studie* 5 (2003): 1–10.
8. Bilir, Faruk. "Anayasa Yapımına Yönelik Değerlendirmeler" (Analyses on Constitution-Making). *Gazi University Law Faculty Journal* (2008): 551–564.
9. Blount, Justin. "Participation in constitutional design": 38–57. In: Tom Ginsburg and Rosalind Dixon, eds. *Comparative Constitutional Law Participation in Constitutional Design*. Cheltenham: Edward Elgar Publishing, 2011.
10. Braunstein, Richard. *Initiative and Referendum Voting: Governing Through Direct Democracy in the United States*. LFB Scholarly Publishing LLC, 2004.
11. Butler, David, and Austin Ranney. "Summing Up": 221–222. In: David Butler and Austin Ranney, eds., *Referendums: A Comparative Study of Practice and Theory*. Washington, DC: American Enterprise Institute for Policy Research, 1978.
12. Celik, Metin. "Avrupa Birliği'nde Yaşanan Meşruiyet Krizi" (Legitimacy Crisis in the EU). *Gazi University School of Economics and Administrative Sciences Journal* (2013): 151–190.
13. Crook, Malcolm. "Ma volonte est celle du peuple: Voting in the Plebiscite and Parliamentary Elections During Napoleon's Hundred Days. April-May 1815." *French Historical Studies* 2009, 32 (4): 619–645.
14. Gözler, Kemal. *Kurucu İktidar* (*Founding Government)*. Bursa: Ekin Publishing, 2016.
15. Gözler, Kemal. *Türk Anayasa Hukuku Dersleri (Turkish Constitution Law Lesson)*. Bursa: Ekin Publishing, 2019.
16. Gül, Mehmet Şener. *Anayasa Hukuku Açısından Kurucu Referandum* (*Constituent Referendum with Respect to Constitution Law)*. Unpublished Master's Thesis. Ankara: Ankara University, Institute of Social Sciences, 2000.
17. Karakartal, Bener. "Bir Siyasal bir Siyasal Katılma Tu̇ru̇ Olarak Referandum ve 1961 Tu̇rk Anayasa Referandumu" (Referendum as a Type of Political Participation and 1961-dated Turkish Constitution Referendum). *İstanbul*

University Journal of the Faculty of Economics Vol. 38, No.3-4 (2011): 161–180.

18. Kelsen, Hans. *Allegemine Staatslehre*, Berlin: Springer, 1925.
19. Kucherenkıa, Petr A., Badma V. Sangadzhieva, and Murad C. Velibek. "Legal Nature and Functions of Referendum in Constitutional Law Theory." *International Journal of Environmental and Science Education* Vol. 11, No. 16 (2016): 8764–8770.
20. Lijpart, Arend. *Democracies: Patterns of Majoritarian and Consensus Government in Twenty-One Countries*. New Haven, Conn.: Yale University Press, 1984.
21. Lipset, Seymour Martin. *Political Man*. Mercury Books, 1963.
22. Loughlin, Martin. "On Constituent Power": 149–224. In: Michael W. Dowdle and Micheal Wilkinson, eds. *Constitutionalism Beyond Liberalism*. Cambridge: Cambridge University Press, 2017.
23. Möckli, Silvano. "Direct Democracy in Nine Countries: A Survey." Paper presented at the conference "Democrazie e referendum", Societt Italiana di Studi Elettorali, IV. Convengno Internazionale (Prato, October 3-5, 1991): 1–18 // https://www.alexandria.unisg.ch/251611/1/Silvano%20Moeckli%20Direct%20Democracy%20in%20Nine%20Countries.pdf.
24. Möckli, Silvano. *Direkte Demokratie. Ein intenationaler Vergleich*. Bern: Verlag Paul Haupt, 1994.
25. Negri, Antonio. *Insurgencies: Constituent Power and the Modern State*. University of Minnesota Press, 1999.
26. Norman, Adamson S., and Sarfo Kantanka Kwadwo. "The Role of Referendum: A Case of Ghana." *African Journal of History and Culture* Vol.1, No.1 (2009): 1–5.
27. Özbudun, Erun. *Türk Anayasa Hukuku*, *Turkish Constitutional Law*. Ankara: Yetkin Press, 2019.
28. Qvortrup, Matt. "Is the Referendum a Constitutional Safeguard?" // http://www.iandrinstitute.org/docs/Qvortrup-Is-the-Referendum-a-Constitutional-Safeguard-IRI.pdf.
29. Qvortrup, Matt. *The Referendum and Other Essays on Constitutional Politics*. Oxford, UK: Hart Publishing, 2019.
30. Raz, Joseph. *The Morality of Freedom*, Oxford: Oxford University Press, 1986.
31. Reilly, Shauna. *Direct Democracy: A Double-Edged Sword*. Lynne Rienner Publishers, 2018.

32. Rios, Joel Colon. "The Legitimacy of the Juridical Power, Constituent: Democracy and the Limits of Constitutional Reform." *Osgoode Hall Law Journal* Vol.48 (2010): 235–237.
33. Rios, Joel Colon. "The Second Dimension of Democracy: The People and Their Constitution." *Baltic Journal of Law and Politics* Vol. 2, No. 2 (2009): 1–30.
34. Roznai, Yaniv. *Unconstitutional Constitutional Amendments: A Study of the Nature and Limits of Constitutional Amendment Powers*. A thesis submitted to the Department of Law of the London School of Economics for the degree of Doctor of Philosophy, 2014.
35. Şahbaz, İbrahim. *Yarı Doğrudan Demokrasi Kurumu Olarak Referandum ve Türkiye* (*Referendum as a Semi-Direct Democracy Institution and Turkey)*. Ankara: Yetkin Press, 2006.
36. Saglam, Fazıl. *Anayasa Hukuku Ders Notları (Constitutional Law Lecture Notes*). Nicosia: Near East University Publications, 2013.
37. Sartori, Gioavanni. *Return to Democracy Theory*. Trans. Tuncer Karamustafaoglu and Mehmet Turhan. Ankara: Yetkin Press, 1996.
38. Schmitt, Carl. *Constitutional Theory*. Trans. J. Seitzer. Duke University Press, 2008 [1928].
39. Setela, Maija Talvikki. *Theories of Referendum and The Analysis of Agenda-Setting*. ProQuest Publishing, 1997.
40. Şen, İlker Gökhan. *Doğrudan Demokrasi* (*Direct Democracy)*. İstanbul: Oniki Levha Press, 2013.
41. Sieyès, Emmanuel-Joseph. *What is the Third Estate?* Trans. M. Blondel. London: Pall Mall Press, 1963 [1789].
42. Sinclair, John. "Legitimate": 951 In: *Collins Cobuild English Dictionary*. London: Harper Collins Publication, 1995.
43. "Siyasal Bilgiler Fakültesi Gerekçeli Anayasa Tasarısı, Ankara Üniversitesi Siyasal Bilgiler Fakültesi Yayınları" (Institute of Administration Sciences Views on Justified Constitutional Draft and Election Method). Ankara University. *Political Sciences Publications* (1960): 9–10.
44. Suksi, Markku. *Bringing in the People*. London: Martinus Hijnoff Publishers, 1993.
45. Tanör, Bülent. *İki Anayasa* (*Two Constitutions)*. İstanbul: Oniki Levha Press, 2013.
46. Tanör, Bülent. *Osmanlı Türk Anayasal Gelişmeleri* (*Ottoman -Turkish Constitution Developments)*. İstanbul: Yapı Kredi Press, 2011.
47. TBMM Research Center. "Bir Doğrudan Demokrasi Aracı Olarak Referandum Uygulama Örnekleri, Türkiye-ABD- Avrupa Örnekleri" (As a Direct Tool For

Democracy; Cases on Referendum Practices): Ahmet Yıldız, Ercan Durdular, Mehmet Solak, and Hüdai Şencan, eds. *Turkey-USA- Europe Case Models*. Ankara: TBMM Press, 2010.

48. Teziç, Erdoğan. *Anayasa Hukuku* (*Constitutional Law)*. İstanbul: Beta Press, 2019.
49. Tierney, Stephen. "Should the People Decide: Referendums in a Post-Sovereign Age, the Scottish and Catalonian Cases." *Netherlands Journal of Legal Philosophy* Vol. 45, No. 2 (2016): 99–118.
50. Tierney, Stephen. "Constitutional Referendums: A Theoretical Enquiry." *Modern Law Review* Vol. 72, No. 3 (2009): 360–383.
51. Tierney, Stephen. *Constitutional Referendums: The Theory and Practice of Republican Deliberation*. Oxford University Press, 2012.
52. Ulari, Pier Vincenzo. "Introduction": 1–20. In: Michale Gallagher and Pier Vincenzo Uleri, eds. *The Referendum Experience in Europe*. Macmillan Publishers, 1996.
53. Voigtlander, Nico. and Hans, Joanchim Voth. "Highway to Hitler." National Bureau of Economic Research. *Working Paper* 20150 (2014):1–51.
54. Wambaugh, Sarah. *A Monograph on Plebiscites with a Collection of Official Documents*. Oxford University Press, 1920.

LEGAL REFERENCES

1. *Law No: 70*. Official Gazette: 05.08.1982 / 17773.
2. *Law No: 157, Resolution Date:12.12.1960*. Official Gazette :16.12.1960/10682.
3. *Law No: 2324, Resolution Date: 27.10.1980*. Official Gazette: 28.10.1980/12145.
4. *YSK Law No: 458*. Official Gazette: 20.11.1982/17874.
5. *TBMM Presidency, Law No: 1, Resolution Date: 12.06.1960*. Official Gazette: 14.06.1960/10525.